92-288

No.

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1992

In re: Holiday Towers, et al.

Theodore R. Saker,

Petitioner

v.

Fred M. Luper,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals err when it found statutory and case law as appropriate cures for the lack of compliance with Article III of the Constitution in the structure of bankruptcy courts as found by this court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 [1952]?

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Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,
458 U.S. 50 [1982] i, v, 1, 2, 5, 8, 9

Treatises:

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OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished but it is included page A-2 of the Appendix.

The opinion of the U.S. District Court for the Southern District of Ohio, Eastern Division, was not published but it appears at page A-19 of the Appendix.

JURISDICTIONAL GROUNDS

On May 15, 1992, the U.S. Court of Appeals for the Sixth Circuit upheld the District Court in Ohio by claiming that a 1984 congressional enactment adopted since Northern Pipeline was decided in 1982 solved the constitutional deficiency this court found.

This court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. 1254[1].

The courts below had federal jurisdiction pursuant to 28 U.S.C. 1331.

STATEMENT OF THE CASE

A claim was presented in the bankruptcy case of Holiday Towers, Inc., which received adverse consideration by the bankruptcy court. In the course thereof, the claimant challenged the jurisdiction of that court. Such challenge was founded on the basis that Marathon had held that the bankruptcy court was not structured in compliance with Article III of the Constitution. That issue was transferred to the District Court which held that the question raised by Marathon had been rectified by a statute enacted subsequent to the Marathon holding.

That decision was appealed to the Court of Appeals of the Sixth Circuit

which upheld the District Court ruling.

Thereafter, this petition for a writ of certiorari was timely filed.

REASONS FOR GRANTING THE WRIT

Marathon, as decided by this court, found that the bankruptcy courts were erected by a statute that failed to place such courts on the basis as is required by Article III. After two years of delay in implementing Marathon, the Congress enacted a new statute in 1984, [28 U.S.C. 157{b}].

The circuit court claims that the language found in the 1984 act was intended to give the bankruptcy court jurisdiction over core proceedings that do not exceed constitutional limits. In

support of this view, the court cited In re Meyertech Corp., 831 F2d 410, at 416 [3d Circuit, 1987].

The bankruptcy courts are an essential vehicle for the resolution of the claims and rights of debtors and creditors. Their present status is in disarray because of the infirmities of the present statute that attempts to define the character and authority of such courts. The most outstanding authority in the field of bankruptcy points out the various land mines that are strewn across the field of bankruptcy litigation. The writ sought should be allowed so that a definitive action can be taken that will lead to a constitutional basis for such courts.

ARGUMENT

In Meyertech, the court held that Congress adopted the Bankruptcy Amendments and Federal Judgeship Act of 1984, "the 1984 Act". The court held that the new statute did not "run afoul of constitutional prohibitions, among which was 28 U.S.C. 157 relating to core proceedings".

Yet in Meyertech, the court [at page 416] said:

> It is difficult to perceive of a proceeding which would not fall under the all-encompassing language of either Section 157[b][2][A] or Section 157[b]-[2][O] but we are cautioned that an expansive interpretation of these provisions may lead to some seemingly incorrect and overbroad results regarding core proceedings.

The opinion in Meyertech candidly recognizes the difficulty of attempting to distinguish between core and non-core

proceedings. A very searching discussion as to the difficulties involved is provided and, finally, the court ruled that the district court properly disdained granting a de novo review.

The other two authorities cited by the Sixth Circuit did not discuss Marathon or the 1984 Act.

The Meyertech court cited decisions of other circuit courts of appeal that wrestled with the issue as to whether the 1984 Act resolved the question raised in Marathon. It would appear that allowance of the writ sought herein may pave the way for a full exposition of the difficulties presently being experienced. Meyertech then resorts to Collier on Bankruptcy. However, at Section 3.01, page 3-37, Collier offers

some surprising and even embarrassing comments on the present state of the law, as follows:

> "Cases" under title 11 and civil proceedings may be referred by the district courts to the bankruptcy judges under section 157[a] to be heard and determined by the bankruptcy judges.
>
> Section 157(b)[1] is drawn from paragraph [d][1] of the Emergency Rule. The line between "cases" and "core proceedings" is not as clear as one might like. The authority to hear and determine "cases" overlaps the authority to hear and determine "matters concerning the administration of the estate" one of the "core proceedings" illustrated by section 157[b][2]. On the other hand, exactly what is encompassed within the power to hear and determine "cases" as opposed to "core proceedings" will probably seldom, if ever, have to be drawn. **The battleground has been and will continue to be over the relationship among "core proceedings" and "related matters" and matters not within** the bankruptcy jurisdiction at all, discussed above.
>
> **{Here, Collier** adds this footnote: "See Section 3.01[1][c][iv]-[vi] supra. An additional battleground was created by the Supreme Court's decision in Granfinanciera, S.A. v.

Nordberg, 492 U.S. 33, * * * discussed at Sections 3.01[2][b][ii], 3.01[7][b] infra.}

Collier then goes on to say [page 3.38]:

> Generating **even more confusion** is the fact that many of the core matters illustrated in section 157[b][2] are those which may also be encompassed with the common understanding of the term "administrative matters," used in section 157[b][1].

Collier then proceeds to cite the tenuous state of the law which makes it difficult if not impossible to determine what is within the authority of the bankruptcy courts to adjudicate and which items must be placed before the district court.

At page 3-40, one of the authors of the 1984 Act, Representative Kastenmeier is quoted as to his view of what defines a "core proceeding".

However, Collier goes on to say that "Civil proceedings which are "related to" title 11 cases by definition are not core proceedings. **Any other jurisdictional construct would be unconstitutional" {!} (Emphasis supplied)**

Collier discusses the "automatic reference" by district judges in referring ALL bankruptcy matters to the bankruptcy judges.

Hence, it can now be seen that the 1984 Act was not much more than a cosmetic change in the law. The dangers and evils found in Marathon live with us still.

Collier describes [page 3.43] how some courts have been misled into expanding bankruptcy court

jurisdiction beyond that permissible under Marathon.

At page 3.45, Collier points out the omnibus category as being open to "interpretation and controversy".

At page 3-48, Collier says that "Surprisingly, it is now probable that the filing of a proof of claim deprives the claimant of the right to a jury trial" [in certain instances. Further,] "Controversy will arise, however, when a creditor files a proof of secured claim."

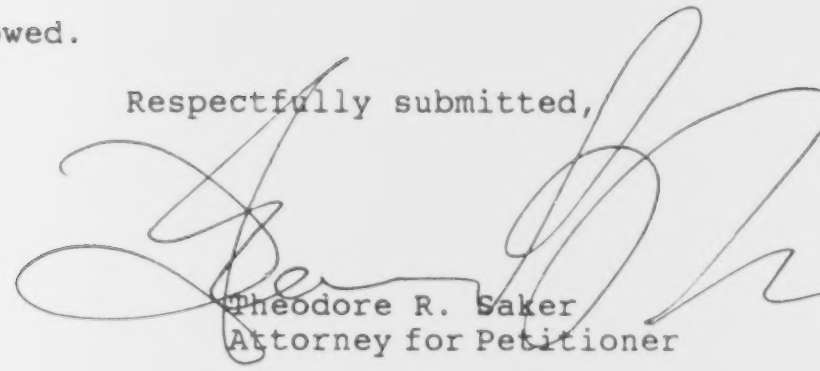
The state of this area of law is in disarray. The number of bankruptcy cases filed annually continues to climb. This phase of adjudication needs a basis of operation that will preclude doubt, controversy or the

deprivation of allied or ancillary rights.

CONCLUSION

The writ sought should be allowed.

Respectfully submitted,

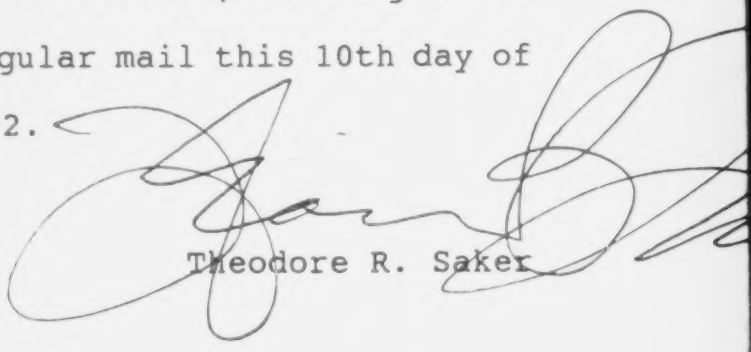


Theodore R. Saker
Attorney for Petitioner

Because the constitutionality of a federal statute is challenged by this action, the Solicitor General of the United States is being served with a copy of the herein petition.

CERTIFICATE OF SERVICE

A copy of the within petition was served on Debrah Ecker, attorney for appellee, 50 West Broad St., Columbus OH 43125, and upon the Solicitor General of the United States, % Department of Justice, Washington DC 20530 by regular mail this 10th day of August, 1992.



Theodore R. Saker

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Opinion of the U.S. District Court, Northern District of Ohio, Eastern Division A-19

A-2 Filed:
May 15, 1992

No. 91-3854
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE HOLIDAY TOWERS:

THEODORE R. SAKER,

Appellant

v.

FREDERICK M. LUPER,

Appellee

Before: Martin and Ryan, Circuit Judges; and Wilhoit, District Judge.*

RYAN, Circuit Judge. Appellant Theodore R. Saker appeals the order of the district court that dismissed Saker's appeal from an order of the bankruptcy court granting Saker fees in the underlying bankruptcy proceeding. The

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* The Honorable Henry R. Wilhoit, Jr., United States Judge for the Eastern District of Kentucky, sitting by designation.

bankruptcy court granted Saker less than ten percent of the amount he sought.

The appeal presents issues concerning the bankruptcy court's authority and the propriety of costs assessed against Saker.

The court affirms the district court's order and orders that costs be assessed against Saker.

I.

Saker is counsel to debtor Holiday Towers, Inc., and Frederick M. Luper is the Chapter 11 Trustee of Holiday Towers. Holiday Towers filed a petition in bankruptcy in April 1981.

This appeal arises from Saker's attempt to recover fees for his work on behalf of Holiday towers.

In July 1990. Saker filed an application for fees in the bankruptcy court for the Southern District of Ohio along with a diary of services rendered on behalf of Holiday Towers. Saker sought $7,815 from the bankrupt estate for serves rendered from July 1, 1986 through January 25, 1990. In February 1991, the bankruptcy court found numerous flaws, omissions and inadequacies in Saker's application, and granted

fees for just 5.5 hours work at a rate of $110/hour, for a total of $605.

In March 1991, Saker appealed to the district court. In May, Luper moved the district court to dismiss Saker's appeal, and Saker responded with a brief claiming that the entire bankruptcy court system was unconstitutional. On August 14, 1991, the district court found that "Saker's brief is patently frivolous, and is an outrageously obvious ploy aimed at frustrating the efficient administration of justice." The district court granted Luper's motion to dismiss the appeal,

from which dismissal Saker appeals to this court.

Before this appeal was filed, Luper moved in the district court for Rule 11 sanctions against Saker, based on the frivolousness of Saker's appeal. The district court granted the motion.

II.

A.

This court will not disturb a bankruptcy court's award of attorney's fees absent an abuse of discretion or erroneous application of the law. In re Riverside-Linden Investment Co., 925 F.2d 320, 322, [9th Cir. 1991].

Saker argues that the Bankruptcy Amendments and Federal Judgeship Act,

28 U.S.C. §§ 1451-58 [the 1984 Act], is unconstitutional because it vests judicial power in non-Article III courts. Saker asserts that Article III reflects the intent of the framers to have the judicial power exercised by judges who "would have no anxiety over their tenure . . . and could be fearless and independent." He contends that although bankruptcy courts exercise the judicial power, the demands of Article III are not met.

Saker's argument is meritless. The Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the

United States." Art.I, §§ 8. Pursuant to this power, Congress enacted Title II, the Bankruptcy Code, and more recently, the 1984 Act, 28 U.S.C. §§ 151-58.

The Bankruptcy Code authorizes counsel in a bankruptcy proceeding to apply for and receive attorney's fees from the bankruptcy estate. Section 330 of the Bankruptcy Code provides that the bankruptcy court

> may award to . . . the debtor's attorney . . . reasonable compensation for actual, necessary services . . . based on the nature, the extent, and the value of such services and the cost of comparable services other that in a case under this title . . . .

11 U.S.C. § 330[a].

In 1982, the Supreme Court held

that the grant of jurisdiction to the bankruptcy courts under the then-existing bankruptcy court system was unconstitutional. Northern Pipeline Construction Co. v Marathon Pipe Line Co., 458 U.S. 50 (1982). In Marathon, the bankrupt petitioner sought to have the bankruptcy court adjudicate its claim to recover contract damages to augment the bankruptcy estate. The Court held that this exercise of jurisdiction was unconstitutional.

In response, Congress passed the 1984 Act to revamp the jurisdiction of the bankruptcy courts. The Act provided, in relevant part: (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or

> arising in a case under title 11
> . . . .
> (2) Core proceedings include, but are not limited to--
> (A) matters concerning the administration of the estate
> . . . . 28 U.S.C. §§ 157 (b).

This language is intended to give the bankruptcy court jurisdiction over core proceedings that does not exceed constitutional limits. In re Meyertech Corp., 831 F.2d 410, 416 (3d Cir. 1987).

Determinations of attorney's fees are core proceedings because such determinations are obviously matters concerning the administration of the estate. "The fact that the dispute concerns the allowance or disallowance of a claim for attorneys' fees against the estate and the extent and validity

of (the secured creditors) lien for fees further supports the exercise of jurisdiction by the bankruptcy court over the core proceeding." In re Hudson Shipbuilders, Inc., 794 F. 2d 1051, 1055 (5th Cir. 1986). See also, Riverside-Linden, 925 F.2d at 322.

The bankruptcy court's exercise of jurisdiction to enter a final order on Saker's application for fees is within the limits of jurisdiction established by 28 U.S.C. §§ 157 (b). Further, it is also within the constitutional limits established by Marathon. In his plurality opinion, Justice Brennan described the jurisdiction of bankruptcy courts:

"(T)he restructuring of debtor-creditor

relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights . . . ." 458 U.S. at 71. The awarding of fees to a debtor's attorney is an aspect of debtor-creditor relations, and no state-created private rights are involved.

The bankruptcy court was well within both constitutional and statutory limits of its authority when it entered a final order determining Saker's fees. We affirm the district court's order dismissing Saker's appeal.

B.

Luper argues that Saker's appeal

is completely frivolous and asks this court, pursuant to Fed. R. App. P. 38, to assess costs against Saker.

We agree with Luper. This case presents the narrow question whether the bankruptcy court was within its jurisdiction to enter an order determining the fees of a debtor's attorney. Nevertheless, Saker never directly addresses this question. He does not dispute the factual conclusions of the bankruptcy court, nor does he argue that the district court violated bankruptcy court, nor does he argue that the district court violated bankruptcy procedures when it dismissed his appeal. Rather, he attacks the entire bankruptcy court system. As a result,

he fails to cite a single authority for the contention that attorney fee determinations exceed the constitutional limits of the bankruptcy court's jurisdiction. His appeal of this question ignores an accepted and rarely challenged rule of law, that a bankruptcy court has jurisdiction to enter final orders in matters of administration such as the determination of attorney's fees. As noted in one well-known treatise:

> There has never been any doubt about the constitutional authority of a non-tenured judge to enter final orders in such matters (of administration), which are unique to bankruptcy cases. This has been true since the regime of the Bankruptcy Act remains true today, even under Marathon . . . . This being so, this category of

> core proceedings has produced almost no litigation regarding bankruptcy court jurisdiction.

1 Collier on Bankruptcy §§ 3.01, at 3-41-42 (Lawrence P. King ed. 1992) (footnotes omitted). Saker's appeal flouts this sound conclusion by litigating a well-settled matter.

Saker compounds the frivolity of his appeal by baselessly attacking the constitutionality of the entire bankruptcy court system. In his submissions to this court and to the district court, Saker argues that the 1984 Act suffers from the same constitutional deficiencies as did the previous bankruptcy court system struck down by Marathon. THe facts of this case, however, simply do not allow Saker to

make a meaningful challenge of the bankruptcy court system. This case involves the simple question whether a bankruptcy court may determine the fees of a debtor's attorney. Marathon considered the much more complex question of whether a bankruptcy court may adjudicate state law claims. Saker's attempts to use the reasoning of Marathon are fruitless. Further, Saker fails to cite any authority for his constitutionality argument. Given Saker's misguided , inappropriate, and unsupported arguments, we find that his appeal is frivolous, and will assess the costs of the appeal against him.

Finally, we note that the district court reached a similar conclu-

sion regarding Saker's arguments. After Saker filed the present appeal to this court, Luper moved the district court for Rule 11 sanctions against Saker because Saker's first appeal of the bankruptcy court's order, to the district court, was frivolous. The district court granted motion, and granted Luper $605 in fees as a sanction against Saker. The district court reasoned that "it is abundantly clear from Saker's brief that he was not making a serious, genuine attempt to assert a constitutional issue under Marathon." Saker's arguments before this court suffer from the same shortcoming.

III

The district court's order dismissing Saker's appeal is AFFIRMED. This court finds that Saker's appeal is frivolous and we shall assess costs against Saker. This court directs Luper to file a statement detailing the actual costs of defending this appeal.

A-19 Filed:
August 14, 199

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Re: Holiday Towers, Inc.
Debtor Case No. C2-91-386

Judge Graham

OPINION AND ORDER

Theodore R. Saker, attorney for the debtor in the bankruptcy proceedings below, appeals from a final order of the bankruptcy court in which the court granted Saker a total of $605 in connection with a fee application in which Saker requested $7,815. The bankruptcy court reduced Saker's fees because Saker's application contained entries that overlapped with entries in previous applications, his entries lacked requisite specificity, his al-

lotment and method for computing time spent was arbitrary and capricious (such as 18 minutes to review a six-line order), he included items that benefited himself rather than the estate, and he failed to serve the parties-in-interest with copies of his application. This matter is before the Court on the trustee's motion to dismiss and his motion for extension of time to file brief. Also before the Court is Saker's motion for leave to file his brief instanter, which is accompanied by a copy of his brief.

This appeal was docketed with this Court on May 15, 1991. Bankr. R. 8009 (a) provides that the appellant's brief must be filed within 15 days

after the appeal is docketed with the district court. On June 4, 1991, Saker's brief having not been filed, the Court entered an order directing Saker to show cause, within 10 days, why the appeal should not be dismissed for want of prosecution. On June 14, 1991, Saker filed his motion for leave to file his brief instanter. The ground for his motion was that he has been busy. The Court is concerned with Saker's unresponsive effort to show cause. The Court is even more concerned, however, with Saker's brief.

In the proceeding below, the bankruptcy court held hearing on Saker's fee application and on February 25, 1991 issued a detailed order ex-

plaining, point by point, its reasons for reducing Saker's fees. This is the order from which Saker appeals. In his brief, however, Saker does not challenge a single factual finding or conclusion of the bankruptcy court. Rather, Saker's sole basis for appeal is that the bankruptcy court had no authority to act in this case pursuant to Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In Marathon, the Court held, inter alia, that portions of the bankruptcy code violated Article III of the U.S. Constitution because they delegated too much authority to non-Article III bankruptcy judges. In other words, Saker seeks to challenge the entire

United States bankruptcy system. Saker cites no cases other than Marathon, and raises no other issues.

Saker's brief is patently frivolous, and is an outrageously obvious ploy aimed at frustrating the efficient administration of this case. His brief has absolutely nothing to do with the bankruptcy court's order. Saker's four-page brief is not more than a superficial outline of the Marathon holding. It completely ignores, for example, the fact that Congress addressed the constitutional deficiency identified in Marathon by making the bankruptcy court part of the the district court. See Bankruptcy Amendments and Federal Judgeship Act of 1984, 28

U.S.C. §§151-158. Hence, Saker's diminutive brief does not even attempt seriously to address the issue it purports to raise. Moreover, the appeal makes no sense--even if the bankruptcy court had no authority to grant him any fees in the first place. Thus, Saker lacks standing to assert the Marathon "issue" because he has no stake in its resolution. Because Saker's brief is patently frivolous on its face, his motion to file the brief instanter will be denied.

The trustee's motion to dismiss appeal is based upon Saker's failure to timely file a designation of items and statement of issues, as required by Bankr. R. 8006. Saker has no responded

to the trustee's motion, and it appears from the table of contents on appeal and the record itself that these items were not timely filed. Bankr. R. 8001 provides in part:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. (Emphasis added).

Viewing Saker's failure to follow the Bankruptcy Rules in conjunction with the patently frivolous nature of his brief, the Court finds that the

instant appeal should be dismissed. There would be no point in allowing this appeal to proceed further.

Based on the foregoing, Saker's motion for leave to file his brief instanter is DENIED. The trustee's motion to dismiss is GRANTED, and this appeal is hereby DISMISSED. Costs shall be taxed against Saker.

If the trustee chooses to do so he may, within twenty (20) days of the date of this order, file with the court a motion for sanctions against Saker under Fed. R. Civ. P. 11 on the basis that the appeal was not well-grounded in law or fact, and was interposed for an improper purpose. If, however, the Trustee in his discretion determines

that it is not in the best interests of the estate and its creditors to pursue sanctions in this case, he may file a statement to that effect in the bankruptcy court, and final distribution to the creditors may proceed forthwith.

It is so ORDERED.

Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

(2)

No. 92-288

In The
Supreme Court of the United States
October Term, 1992

In re:

HOLIDAY TOWERS, INC.

THEODORE R. SAKER,

Petitioner,

v.

FREDERICK M. LUPER, TRUSTEE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LUPER, WOLINETZ, SHERIFF & NEIDENTHAL
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QUESTION PRESENTED FOR REVIEW

1. Was the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, within its jurisdiction when it entered an order determining the fees of a debtor's attorney?

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STATEMENT OF THE CASE

On July 9, 1990, Theodore R. Saker, A Legal Professional Association, (hereinafter Saker) filed a Notice of Final Application by Counsel for Debtor for Compensation for services rendered to the bankruptcy estate of Holiday Towers, Inc. along with a Diary of Services Rendered on Behalf of Holiday Towers, Inc. Counsel for the Trustee objected to such final application, pointing out in detail the deficiencies, errors, and incomprehensible items in the Diary of Services. On February 26, 1991, the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, entered an Order on Saker's Final Application citing lack of detail, arbitrary and capricious time entries and computation of hours, fatally flawed timekeeping records, and lack of appropriate service of Saker's Diary of Services, among other deficiencies, as grounds to disallow most of the fees requested.

On March 8, 1991, Saker filed a Notice of Appeal of the Bankruptcy Court's Order. The question presented by Saker to the United States District Court was as follows: "Does Article III of the United [States] Constitution apply to the court below to the extent of vitiating such court's

actions for lack of constitutional authority?" This appeal did not challenge any factual finding or legal conclusion of the Bankruptcy Court, but rather sought to challenge the entire United States bankruptcy system. The District Court found Saker's brief to be "patently frivolous," and "an outrageously obvious ploy aimed at frustrating the efficient administration of this case." (Pet. Appendix, p. A-23).

On September 12, 1991, Saker filed a Notice of Appeal of the decision of the United States District Court to the United States Court of Appeals for the Sixth Circuit. Saker stated the issue presented as follows: "Do the U.S. Bankruptcy Courts have a basis under the constitution to exercize [sic] the functions assigned them and have a lawful basis for claiming jurisdiction over said functions?" The United States Court of Appeals for the Sixth Circuit found Saker's argument to be meritless. The Court found that "The bankruptcy court's exercise of jurisdiction to enter a final order on Saker's application for fees is within the limits of jurisdiction established by 28 U.S.C. §157(b). Further, it is also within the constitutional limits established by Marathon." (Pet. Appendix, p. A-11).

Thereupon, Saker filed his Petition for a Writ of Certiorari on August 17, 1992.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

Respondent respectfully submits that the petition for a writ of certiorari be denied for two reasons.

First, Saker lacks standing to present the broad issue of the constitutionality of the entire bankruptcy court system. Both the United States District Court and the United States Court of Appeals for the Sixth Circuit so found, both describing Saker's appeals as frivolous.

Second, if Saker is presenting the issue of the authority of the Bankruptcy Court to enter an order determining the fees of a debtor's attorney (the only constitutional issue which Saker has standing to present), it is well settled that the Bankruptcy Court possesses jurisdiction to determine administrative matters such as fee applications of debtors' counsel.

Since it is apparent that the instant petition for a writ of certiorari is frivolous, respondent requests that this Honorable Court award him just damages and costs pursuant to Rule 42.2 of the rules of this Honorable Court.

ARGUMENT FOR DENYING THE PETITION

1. SAKER LACKS STANDING TO PRESENT BEFORE THIS COURT THE BROAD ISSUE OF THE CONSTITUTIONALITY OF THE ENTIRE BANKRUPTCY COURT SYSTEM.

The United States Court of Appeals for the Sixth Circuit appropriately noted that the question at issue is simply "whether the bankruptcy court was within its jurisdiction to enter an order determining the fees of a debtor's attorney." (Pet. Appendix, p. A-13). Saker simply has no standing to challenge the entire structure of bankruptcy courts. It is axiomatic that "A case or controversy must exist at all stages of an action." Steffel v. Thompson, 415 U.S. 452 (1974). Furthermore, "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." Aetna Life Insurance Company of Hartford Conn. v. Haworth, 300 U.S. 227 (1937).

In order to meet the case or controversy requirement, it is necessary that a party have standing to sue. The standing question asks "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to

justify exercise of the court's remedial powers on his behalf." Worth v. Seldin, 422 U.S. 490, 498-99 (1975).

In the instant case, Saker clearly cannot have a personal stake in the outcome of the controversy he seeks to present before this Court. Saker invoked the Bankruptcy Court's jurisdiction when he petitioned it for fees. United States District Judge Graham correctly reasoned that "even if the bankruptcy court had no authority to curtail Saker's fees, then it would also have lacked authority to grant him any fees in the first place. Thus, Saker lacks standing to assert the Marathon 'issue' because he has no stake in its resolution." (Pet. Appendix, p. A-24).

The United States Court of Appeals for the Sixth Circuit similarly found that "The facts of this case . . . simply do not allow Saker to make a meaningful challenge of the bankruptcy court system. This case involves the simple question whether a bankruptcy court may determine the fees of a debtor's attorney. Marathon considered the much more complex question of whether a bankruptcy court may adjudicate state law claims. Saker's attempts to use the reasoning of Marathon are fruitless. . . . Given Saker's misguided, inappropriate, and unsupported arguments, we find that his appeal is frivolous". (Pet. Appendix, pp. A-15 and A-16).

Nothing in Saker's Petition for Writ of Certiorari changes the fact that Saker continues to lack standing to assert a broad challenge to the bankruptcy court system.

2. THE BANKRUPTCY COURT POSSESSES CONSTITUTIONAL AUTHORITY TO EXERCISE THE JURISDICTION CONFERRED UPON IT.

Although Respondent does not believe that the constitutional authority of the Bankruptcy Court to exercise its jurisdiction is properly before this Court, a review of events subsequent to the decision of this Honorable Court in Northern Pipeline Construction Co. v. Marathon Pipeline Co. (hereinafter Marathon), 458 U.S. 50, 102 S. Ct. 2858 (1982) dispels any issue concerning the constitutional authority of the Bankruptcy Court to rule on Saker's final fee application.

The Marathon case was a breach of contract case filed by a debtor in possession in a bankruptcy court. A plurality of the Court found the grant of jurisdiction to the Bankruptcy Court by section 241(a) of the Bankruptcy Act of 1978 to be unconstitutional for the reason that it "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct." (102 S. Ct. at 2880).

The Court in Marathon stayed its decision until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." (Id. at 2880).

Congress did not take such action and the stay expired prior to the enactment of any legislation.

In the interim, an "Emergency Rule" was adopted as a local rule by the District Court to govern bankruptcy proceedings pending enactment of legislation. The Emergency Rule provided that in certain civil proceedings, bankruptcy judges could not enter final judgments or dispositive orders with respect to "related to" cases commenced under the Bankruptcy Code. Paragraph (c) of the Emergency Rule provided in relevant part that "(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district."

Bankruptcy judges were specifically authorized to perform in referred bankruptcy cases and proceedings "all acts and duties necessary for the handling of those cases and proceedings" with certain enumerated exceptions. (Emergency Rule paragraph (d)).

It is significant that the matter of the authority of the Bankruptcy Court to rule on a fee application, or to rule on an objection to a claim against the estate was never at issue.

The constitutionality of the Emergency Rule was questioned and upheld by circuit courts without exception. The Sixth Circuit upheld the constitutionality of the Rule in the case of White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983).

Finally, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter BAFJA).

BAFJA essentially codified the Emergency Rule. The primary jurisdictional provisions of BAFJA are found in 28 U.S.C. §§1334 and 157. 28 U.S.C. §1334(a) provides as follows:

> Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

The "cases" referred to in §1334(a) are distinguishable from civil proceedings arising under Title 11 or civil proceedings related to or arising in Title 11 cases. In the latter cases, jurisdiction of the District Court is original but not exclusive. The "cases" referred to in

§1334(a) are those proceedings which naturally follow the filing of a bankruptcy petition.

Pursuant to 28 U.S.C. §151, the Bankruptcy Court is a "unit" of the District Court. 28 U.S.C. §157(a) allows the District Court to refer all cases and/or proceedings to the Bankruptcy Court, and the Bankruptcy Court may hear and enter final orders in all core matters pursuant to 28 U.S.C. §157(b)(1).

Core matters are defined in 28 U.S.C. §157(b) by a nonexclusive list of examples including, but not limited to administrative matters. (§157(b)(2)(A)). Fee applications of debtors' counsel, seeking administrative expenses, are most certainly administrative matters. Specifically, §507(a)(1) of the Bankruptcy Code provides for a priority for administrative expenses allowed under §503(b) of the Bankruptcy Code. §503(b)(2) of the Bankruptcy Code provides for allowance of administrative expenses including compensation of officers awarded under §330(a) of the Bankruptcy Code. Saker's fee application was made pursuant to §330(a) of the Bankruptcy Code.

Hence, there is no question that bankruptcy judges have explicit, constitutional authority to decide fee application matters such as that brought by Saker. The United States Court of Appeals for the Sixth Circuit cited

the language of 28 U.S.C. §157(b), indicating that "This language is intended to give the bankruptcy court jurisdiction over core proceedings that does not exceed constitutional limits." (Pet. Appendix, p. A-10, citing In re Meyertech Corp., 831 F.2d 410, 416 (3d Cir. 1987). That Court further found the Bankruptcy Court's exercise of jurisdiction to enter a final order on Saker's application for fees to be "within the constitutional limits established by Marathon." The Court noted as follows:

> In his plurality opinion, Justice Brennan described the jurisdiction of bankruptcy courts: "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights . . . ." 458 U.S. at 71. The awarding of fees to a debtor's attorney is an aspect of debtor-creditor relations, and no state-created private rights are involved.

(Pet. Appendix, pp. A-11 and A-12).

Saker's narrative argument, attempting to down play the holding of the Court in In re Meyertech Corp., 831 F.2d 410 (3d Cir. 1987) and citation to Collier on Bankruptcy with respect to certain issues under §157(b)(1) evidence Saker's questioning of the entire bankruptcy court scheme, rather than the clear, narrow issue of bankruptcy court

authority to determine the fees of a debtor's attorney, upon which he clearly could not prevail.

3. SAKER'S PETITION FOR A WRIT OF CERTIORARI IS FRIVOLOUS, JUSTIFYING AN AWARD OF DAMAGES AND COSTS TO RESPONDENT.

Rule 42.2 of the Rules of this Honorable Court provides in relevant part:

> When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages and single or double costs."

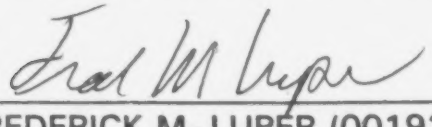
Both the United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit has found Saker's challenge to the constitutionality of the bankruptcy court system to be frivolous. Respondent urges this Honorable Court to recognize the instant petition for a writ of certiorari to be nothing more than the continuance of Saker's "outrageously obvious ploy aimed at frustrating the efficient administration of this case." (Pet. Appendix, p. A-23). The frivolous nature of the instant petition justifies the award to respondent of damages consisting of the value of the time spent in defending this latest appeal, which must otherwise be borne by the innocent creditors of the estate of Holiday Towers, Inc., plus costs.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, and that respondent be awarded damages and costs.

Respectfully submitted,

LUPER, WOLINETZ, SHERIFF & NEIDENTHAL
A Legal Professional Association



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that all parties required to be served with the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari have been served and that a true copy of the same was sent via U.S. Mail, postage prepaid, to Theodore R. Saker, Attorney for Petitioner, 750 South Front Street, Columbus, Ohio 43206, on this 14th day of September, 1992.

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